INHERENT PROPERTY RIGHTS, DEVISE AND DESCENT.*

Mr. Dos Passos, in an article contributed to the *North American Review,* July, 1913, discusses this subject. He states that the Bar generally believes Mr. Marshall to be correct; that his views have the approval of the Bench and Bar, and representative journals, etc. In this article, Dos Passos takes issue with Marshall and the utterances of the courts, and we submit he is correct in his view of it. Every case, in which the proposition above stated was announced, was an inheritance tax case, and did not involve the question of the right to devise or inherit. The only question involved was, the right of the State to tax property upon its transmission or succession by will or intestacy.

No reported case has been found involving the validity of a statute abolishing the right to devise or the right to inherit in case of intestacy. Perhaps, no such law, as yet, has ever been enacted by a legislature. This article of Mr. Dos Passos is an interesting contribution to this important subject and is well worth reading.

The fact that there are many natural rights not specifically mentioned in the Constitution and other organic laws, which no legislature would for a moment dare assail, is frequently overlooked by lawyers and writers. It is a truism, that for every right there is a remedy or one will be found. If all remedies were taken away for the enforcement of many rights, or remedies were made so burdensome and troublesome as to amount to a virtual denial of justice, the courts would do as they have heretofore done, pronounce such legislation invalid. Remedies for the enforcement of existing rights may be changed from time to time, but such legislation must provide a reasonable remedy for their enforcement. As an illustration, if the legislature were to change the statute of limitations and give but a day or an hour to enforce an existing right, a court would pronounce such a legislation unreasonable and invalid.

James Lorrimer, a Scotchman, second edition of "Institutes of Law," a treatise of Principles of Jurisprudence, as Determined by Nature (1880), p. 229, states (g): "The right to

*Continued from the June Number of the VIRGINIA LAW REGISTER.

produce and multiply our being involves the right of transmitting to our offspring the conditions of the existence which we confer as regards our children and our direct descendants. The right of transmitting property springs as obviously from the right of transmitting life, as the right to possess property springs from the right to possess life. We are entitled not only to live, but to live humanely; and the life which we are entitled to transmit is not bare existence in the abstract, but human existence. (i). The right to be involves the right to dispose of the fruits of being, mortis causa."

Page 233 elaborates this idea. In Windham *v.* Chetwynd (1 Burr 414 at 419), Lord Mansfield expresses himself as follows:

"First—Considering the matter at large; let me observe that the power of devising ought to be favored. It is a natural consequence of property, and the right a man has over his own. It was a right by the law of the land before the Conquest and down to about the time of Henry the 2d."

Burlamqui of Principes du Droit de la Nature et des Gens, in his third book (Ed. Paris, 1820), at p. 193, says:

OF WILLS.

"XII. * * * The power of disposing of one's effects by a will follows naturally from the right of ownership and from social order. For in the first place, every one will concede that any one can transfer to another inter vivos, from hand to hand, either absolutely or subject to certain conditions, the ownership which he has over his own property. If that is true, why should he not be permitted to transfer in case of death? Secondly, the intended destination to his successor which an owner has of his goods must give the latter certain rights even during the testator's lifetime; and if he preserves his intention until his death and the successor accepts, the transfer of property becomes absolute and no one could without injustice take possession of the goods of the deceased adversely to the successor. Thirdly, if the goods of a decedent belonged after his death to the first occupant, which would be equivalent to the right of pillage, the result would be a source of disorder, quarrels, and inconveniences. Children and other persons, for whose maintenance the deceased was bound to provide, by reason of natural obligation, would often be deprived of that which he had intended them to own, and which he had acquired by his labor and saved it by his care.

"It is on these foundations that the majority of nations have placed the power of the testator as a natural right by which one, to a certain extent, reconciles himself to the necessity in which he is placed of abandoning his goods by death."

OF SUCCESSION AB INTESTAT.

"XV. But if some one dies without having disposed of his goods to whom should they belong? It cannot be presumed that under these circumstances the proprietor intended to abandon his goods to the first occupant and leave them as it were to the right of pillage. This would be equally contrary to the natural inclination of men, to the good of families, peace of society and to duty."

Page 53, Surrogate Fowler in the matter of Gedney (N. Y. L. J. May 13, 1913), delivered an opinion from which we quote the following:

"The question, whether inheritance is an inherent right or a grant from public society, has been already considered by such great jurists as Theophilus, Cicero, Grotius, Vinnius, Cujas, Puffendorf, Bynekerschoek, Leibnitz, Doneau, Lord Mansfield, Montesquieu, Merlin, Toullier, Proudhon, and other equally great jurists and philosophers of all times and places, and the best thought of the world at the present time is generally conceded to be expressed by the conclusion that the right to dispose of property after death is a natural and inherent right of mankind which cannot be taken away by the State. It is said by one of the greatest of the world's jurists, Troplong, that no country is entitled to be regarded as free where a right to dispose of property by will does not exist."

It would seem that the rights of property are generally acknowledged to be natural and inherent rights. Such being the case, in its very nature one of its most important elements is the right to transfer it during life time, and also, to prescribe on death to whom it shall be passed by transmission or succession.

The case of Magoun above referred to is reviewed in the case of Clark *v.* Titusville, 184 U. S. 332, and it is obvious from what is there stated that the court did not pass or intend to pass, in the Magoun case, on the question of the natural right to devise or children to inherit, but expressly avoided it.

Page 332: "The Appellee claimed that the power of the state could be exerted to the extent of making the State the heir of everybody; the Appellant asserted a natural right of children to inherit. We express no opinion on either contention, but chiefly directed our consideration and decision to the alleged discriminating features of the law of Illinois."

Minot *v.* Winthrop, 162 Mass. 113: "We have no occasion in these cases to consider whether the Legislature has the power to make the Commonwealth the universal legatee or successor of all the property of its inhabitants when they die, for the purposes not only of paying public charges, but also distributing the property according to its will among the living inhabitants, or for the purpose of abolishing private property altogether.

"We assume that under the Constitution * * * this cannot be done, either directly or indirectly; that the Legislature cannot so far restrict the right to transmit property by will or by descent as to amount to an appropriation of property generally; that it can impose a tax which shall be equivalent or almost equivalent to the value of the property, and can not so limit the persons who can take as heirs, devisees, etc.; that the great mass of all the property of the inhabitants must become vested in the Commonwealth by escheat.

"The state can take property by taxation only for public service, and we assume that its right to take property, if any exists, by regulating the distribution of it on the death of the owner is limited in the same manner, and that this right must be exercised in a reasonable way."

The right to make a will or testament, and the right to transmit or take property by descent, is now generally regulated by statute.

A very excellent opinion was delivered by the Supreme Court of Wisconsin, 1906, Nunnemacher *v.* the State, N. W. Rep., vol. 108, pp. 628-630, contains the following:

"The constitutionality of this law, and of any similar law, is now attacked upon the following general grounds: First, that the right to take property by inheritance or by will is a natural right protected by the Constitution, which cannot be wholly taken away or substantially impaired by the Legislature. * * *

"With the first of these propositions we agree. We are fully aware that the contrary proposition has been stated

by the great majority of the courts of this country, including the Supreme Court of the United States. The unanimity with which it is stated is perhaps only equaled by the paucity of reason by which it is supported. In its simplest form it is stated: 'The right to take property by devise or descent is the creature of the law and not a natural right. Magoun *v.* Bank, 170 U. S. 283, 18 Sup. Ct. 594, 42 L. Ed. 1037. In Eyre *v.* Jacob, 14 Gratt. 422, 73 Am. Dec. 367, it is stated more sweepingly thus: 'It [the Legislature] may tomorrow, if it pleases, absolutely repeal the statutes of wills, and that of descents and distribution, and declare that, upon the death of a party, his property shall be applied to the payment of his debts and the residue appropriated to public uses.' But it has been reserved for the Supreme Court of North Carolina to sweep away all natural property rights in a few terse sentences, which may well be quoted: 'Property itself, as well as the succession to it, is the creature of positive law. The Legislature declares what objects in nature may be held as property; it provides by what forms and on what conditions it may be transmitted from one person to another; it confines the right of inheriting to certain persons whom it defines heirs; and on the failure of such it takes the property to the state as escheat. The right to give or take property is not one of those natural and inalienable rights which are supposed to precede all government and which no government can rightfully impair.' Pullen *v.* Commissioners, 66 N. C. 361. In this declaration the Court of North Carolina seems to have easily reached the logical goal toward which the other cases only tend, namely, the denial of all natural rights of property. It comes perilously near the doctrine that might makes right,

> "'The simple plan
> That they should take who have the power,
> And they should keep who can.'

"The fallacy of the idea that the government creates or withholds property rights at will is very apparent. Under our system the government is the creature of the people, the produce of a social compact. The people, in full possession of liberty and property, come together and create a government to protect themselves, their liberty and their property. The government which they create becomes their agent; the officers their servants. Under the theory of the North Carolina court these agents, in turn, create property rights and confer them upon their creators, who possessed these rights long before. The people create an agency to protect their existing rights which assumes to confer or

withhold these same rights. But the question is chiefly historical. From the historical standpoint the idea that all rights of property and rights to transmit the same by inheritance or will have their origin in the positive enactments of law by an established government cannot stand the test. Governments have, indeed, from the earliest times, regulated the exercise of these rights, prescribed ways and forms for their exercise, and protected them by positive law; and so they do now. From this universal exercise of the right of regulation the idea of governmental right to create and destroy may have arisen, but it seems more likely to have arisen from failure to keep in mind the radical difference between our republican theory of the origin of government and the European medieval theory. Our theory is that the people, in full possession of inalienable rights, form the government to protect those rights. The medieval idea was that the government was sent down from above, and that from it rights and privileges were allowed to flow in gracious streams to the people, who otherwise would not possess them.

That there are inherent rights existing in the people prior to the making of any of our Constitutions is a fact recognized and declared by the Declaration of Independence, and by substantially every state Constitution. Our own Constitution says in its very first article: 'All men are born equally free and independent and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights governments are instituted among men deriving their just powers from the consent of the governed.' Notice the language, 'to secure these (inherent) rights governments are instituted;' not to manufacture new rights or to confer them on its citizens, but to conserve and secure to its citizens the exercise of pre-existing rights. It is true that the inherent rights here referred to are not defined but are included under the very general terms of, 'life, liberty and the pursuit of happiness.' It is relatively easy to define 'life and liberty,' but it is apparent that the term 'pursuit of happiness' is a very comprehensive expression which covers a broad field. Unquestionably this expression covers the idea of the acquisition of private property; not that the possession of property is the supreme good, but that there is planted in the breast of every person the desire to possess something useful or something pleasing which will serve to render life enjoyable, which shall be his very own, and which he may dispose of as he chooses, or leave to his children or his dependents at his decease. To

deny that there is such universal desire, or to deny that the fulfillment of this desire contributes in a large degree to the attainment of human happiness is to deny a fact as patent as the shining of the sun at noonday. And so we find that, however far we penetrate into history of the remote past, this idea of the acquisition and undisturbed possession of private property has been the controlling idea of the race, the supposed goal of earthly happiness. From this idea has sprung every industry, to preserve it governments have been formed, and its development has been coincident with the development of civilization. And so we also find that from the very earliest times, men have been acquiring property, protecting it by their own strong arm if necessary, and leaving it for the enjoyment of their descendants; and we find also that the right of the descendants, or some of them, to succeed to the ownership has been recognized from the dawn of human history. The birthright of the first born existed long before Esau sold his right to the wily Jacob, and the Mosaic law fairly bristles with provisions recognizing the right of inheritance as then long existing, and regulating its details. The most ancient known codes recognize it as a right already existing and Justice Brown was clearly right when he said, in U. S. *v.* Perkins, 163 U. S. 625, 16 Sup. Ct. 1073, 41 L. Ed. 287: 'The general consent of the most enlightened nations has from the earliest historical period recognized a natural right in children to inherit the property of their parents.'

"The existence of the right to dispose of property by will in the earliest times is not so easy of proof. Nevertheless, it seems there can be no doubt of the fact. The biblical writings show the exercise of the right from the times of Abraham, and Mr. Schouler in his work on Wills (2d Ed.), § 13, says that history 'confirms the opinion that the practice of allowing the owner of property to direct its destination after his death, or at least of imposing general rules of inheritance, is coeval with civilization itself, and so close, in fact, upon the origin of property and property rights as not to be essentially separated in point of antiquity.' The laws of Solon allowed the willing of personal property in Athens, and the laws of the Twelve Tables in Rome. In England the right of testamentary disposition of personal and real property, or at least a part of it, was recognized from the very earliest times, but lands could not be willed after the Norman invasion and the establishment of feudal tenures until St. 32 Henry VIII, c. 1, §§ 1-5. Cassoday on Wills, § 31, et seq.; 30 A. & E. Enc. Law, p. 549. So clear

does it seem to us from the historical point of view that the right to take property by inheritance or will has existed in some form among civilized nations from the time when the memory of man runneth not to the contrary, and so conclusive seems the argument that these rights are a part of the inherent rights which governments, under our conception, are established to conserve, that we feel entirely justified in rejecting the dictum so frequently asserted by such a vast array of courts that these rights are purely statutory and may be wholly taken away by the Legislature. It is true that these rights are subject to reasonable regulation by the Legislature, lines of descent may be prescribed, the persons who can take as heirs or devisees may be prescribed, the persons who can take as heirs or devisees may be limited, collateral relatives may doubtless be included or cut off, the manner of the execution of wills may be prescribed, and there may be much room for legislative action in determining how much property shall be exempted entirely from the power to will so that dependents may not be entirely cut off. These are all matters within the field of regulation. The fact that these powers exist and have been universally exercised, affords no ground for claiming that the Legislature may abolish both inheritances and wills, turn every fee-simple title into a mere estate for life, and thus, in effect, confiscate the property of the people once every generation.

"But, while we utterly reject the doctrine of Eyre *v.* Jacob, and hold the right to demand that property pass by inheritance or will is an inherent right subject only to reasonable regulation by the Legislature, we are not thereby brought to the conclusion that inheritance or succession taxes cannot be levied. They do not depend upon the right to confiscate. We agree entirely with the ideas expressed by the Supreme Court of Massachusetts in Minot *v.* Winthrop, 162 Mass. 113, 38 N. E. 512, 26 L. R. A. 259, where it said: 'Inheritance or succession taxes are very ancient and are said to have had their origin in the Roman law. They have long been in force in the European states, and in England and her colonies, where they are known as 'death duties.' They may be fully justified under the power of regulation and taxation of transfers of property. No one doubts for a moment that a government may levy a tax upon transfers of land, or upon business transactions; it is done by the federal government in this country whenever additional and extraordinary revenues are needed, in the form of stamp duties. These taxes are not based upon the power

> to interdict or prohibit such transactions, but upon the power to reasonably regulate and tax them. Succession or inheritance taxes may well be sustained upon the same principle; not upon the power to prohibit, but upon the power to reasonably regulate and tax. It entered into and modified the inherent right to possess, transmit, and will property, at the time the Constitution was adopted, so that the inherent right recognized and preserved by the Constitution was and is a right subject to reasonable regulation and taxation."

Concurring opinions were delivered by Marshall, J., and also, a dissenting opinion by Dodge, J., but the latter went so far as to hold that the law of Wisconsin was unconstitutional, because the progressive increase of tax rates, in his opinion, violated the rule of equality of taxation prescribed by the Constitution. Both Marshall and Dodge concur in the above quotation from the opinion of Winslow J., on the point under discussion, as to inherent rights of property and the right of devise and descent. All these opinions are well worth perusal by the profession.

By code of Napoleon, gift, whether inter vivos or by will, was not allowed to exceed one-half of the estate if the testator left but one child, one-third if he left two, one-fourth if he left three; if no children or ancestors, paternal or maternal, he might give away one-half of his property, and if he had ancestors in but one line, then three-fourths.

In Italy one-half of the testator's property was required to be distributed among the children, the other half might be disposed of to whomsoever the testator pleased. Similar restrictions upon the power of disposition will be found in the codes of other continental countries. They are all regulatory of existing and recognized rights.

The taxes, in the above cases, were adjudged not to be a tax upon the property in the ordinary sense of the term.

The opinion of Marshall, J., in McCulloch *v.* State (4 Md., Wheaton, 316) is a model of judicial reasoning, which has never been excelled. It was a case of taxation. Reference is frequently made to the expression p. 431, "That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create. Taxation, it is said does not necessarily and unavoidably destroy. To carry it to the excess of destruction would be an abuse, to presume

which would banish that confidence which is essential to all Government."

Page 426, a corollary to one of the great axioms is stated to be "That a power to create implies a power to preserve," etc. Preservation is guarded by the provisions of our Federal Constitution, our Bill of Rights, and State Constitution. U. S. *v.* Fox (94 U. S. 320) opinion; "The power of the state to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. Statutes of wills are enabling acts, and prior to the statute of 32nd Henry Eighth, there was no general power at common law to devise lands."

24 A. & E. Enc. Law, 1st Ed., 432: "The right to succeed to property upon the death of an owner is the creation of law, and the state which creates it may regulate it, and may subject it to burdens or conditions." Many authorities are cited in the notes to the above, bearing on the various aspects of the right of taxation on the succession to property, but the utterances on the right to inherit or devise are obiter dictum and were not involved.

In many countries, for centuries, wills were nuncupative or unwritten. Court houses and recording offices were unknown. The right to dispose of property by written will, in the form known to us, does not appear in any of the very primitive systems of law except in Egypt. These laws, before the days of printing, were few in number and largely traditional. Yet testamentary disposition, in some form, existed from the earliest times and have come down to us.

The will, as we know it, is a Roman invention. Recently at the city of Susa, a stone was uncovered on which were written the laws of Hammurabi, who lived twenty-three hundred years before Christ, or a thousand years before Moses received the Commandments on Sinai. It treats of laws of inheritance but it does not mention wills.

It is said the will of Job was discovered and published in 1839. Jacob, who died in Egypt and was buried at Machpelah, in the forty-eighth and forty-ninth chapters of Genesis is reported to have called his sons together and told them what would befall

them in the last days. He not only made disposition of a portion to Joseph, but gave to each son according to his virtues or his faults, as therein described.

Petrie, a celebrated Egyptologist, not many years ago unearthed at Kahun a will which was forty-five hundred years old.

The *Irish Law Times,* an excellent authority, states there probably never was a time when testaments in some form or other did not exist, but, in the earliest ages, it has so far been assumed they were never written but nuncupatory, or delivered orally, probably at the death bed of the testator.

Among the Hindus succession, even to this day, hinges upon the sort of ceremonies at the dead man's funeral, not upon any written will. And it is because early wills were verbal only that their history is so obscure.

Sennascherib made a will 681 B. C.; Plato, 348 B. C.; Aristotle, 322 B. C.; Virgil, 10 B. C.; Augustus, 13, A. D., and many other celebraties, from that day to the present, made wills.

A book, entitled "Ancient, Curious and Famous Wills," by Harris, published by Little, Brown & Co., 1911, contains a most interesting collection of testamentary curiosities and famous wills. The reader is referred to it for further information on the exercise of the natural and inherent right of testamentory disposition of property, and, upon mature reflection, will probably reach the conclusion that it existed, notwithstanding the utterances of our Vice-President and jurists to the contrary in cases of the nature above mentioned.

These utterances, it would seem, must have been made without careful consideration and without regard to what is the meaning and embraced within the terms—taxation and escheat. They have an entirely different meaning and are not synonymous.

Taxation is a burden imposed on individuals by the government for its service to them and the maintenance of its functions.

Escheat has an entirely different meaning and signification. Originally, it applied to lands alone, but now extends to all property. It is the reversion to the state, as original proprietor, by reason of a failure of persons legally entitled to take and hold the same. It is the rule of civilized society when the deceased

owner left no heirs it should vest in the Commonwealth. It is only when there are no heirs that it reverts to and vests in the public, and, it thus appears, the distinction is marked, and they are not only different but distinctly so.

In conclusion, we submit the following propositions are well-established and sustained, to wit:

(a) The unrestrained use, subject only to the maximum "sic utere tuo ut alienum non laedas," the exclusive possession, and the right of disposition by devise and, in default thereof, descent of property, regulated by law, inhere in it as of its essence, of and from which man "cannot by any compact" deprive or divest his posterity.

(b) During life, these rights are assured and preserved by the teachings of experience, the doctrines of vested rights as established by the courts, by Constitutions, Bills of Rights, and other Organic and Eminent Domain Laws.

(c) Such rights are indestructible, and are not annihilated by death, under a proper interpretation of all laws, Human and Divine. They are subject to transmission and succession, by devise and descent, in the mode prescribed and as regulated by law.

(d) Regulation of such rights, to be valid, must be regulation, and not such as virtually destroys or annihilates them. The succession of property is a subject of taxation, but the burden of taxation imposed must be within the limit of what a fair definition of the term embraces, and not such as to be confiscatory.

(e) The right to impose a tax on succession or transmission, and the right of the commonwealth to acquire by escheat, are not identical, but are the exercise of powers essentially different. The right of escheat has not been, and cannot be, exercised except there be a failure to make a testamentory disposition and in the event of a failure of descent of property for want of next of kin to inherit it, and such legislation, to be valid, must provide reasonable opportunity to transmit property by devise and descent.

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